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Supreme Court of the United States

October Term, 1962

No. 383

EDWARD CARMINE COPPOLLA
and ALFRED SANANTONIO,
Petitioners,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Edward Carmine Coppolla and Alfred Sanantonio, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 23, 1962.

Citations to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, pp. 1a *et seq.*, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1962 (Appendix, *infra*, p. 11a). By order of Honorable John M. Harlan, Circuit Justice, dated August 21,

1962, the time within which to file a petition for a writ of certiorari in this case was extended to and including August 29, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. In a prosecution for substantive offenses and conspiracy to violate 18 U. S. C. §495 by aiding and abetting the forging and uttering of stolen United States Government Bonds, upon an indictment drawn in 538 substantive counts and two conspiracy counts (involving separate conspiracies), the extraordinary number of counts being justified by the Government solely on the basis of the number of individual bonds allegedly forged and uttered, is such indictment abortive and insufficient on its face to charge an offense on the ground of violation of petitioners' right to due process of law?

2. Where the proofs under such indictment ultimately establish (ostensibly) only nine substantive offenses (and no conspiracy offense) involving petitioners, but where petitioners have been obliged to stand trial under the full indictment with all of its 540 counts, and where despite the elimination of the more than five hundred other counts as to petitioners the jury is still permitted to consider all of the evidence introduced in the entire case in passing on the minuscule remainder of counts, is not the due process aggrievement referred to in question No. 1, above, intensified?

3. Where, moreover, the final washing-out of the proofs leaves the Government's evidence in such a posture that the only crimes ostensibly proven against petitioners would have been cognizable only under State law, should not the

indictment be dismissed on grounds of lack of federal jurisdiction; and is not the due process aggrievement still further intensified?

4. In the circumstances recited in the three preceding questions, was it not error to decline to entertain defense motions addressed to the prodigious scope of the indictment as having been waived by reason of untimeliness under F. R. Cr. P., Rule 12; and in any event should not the right of severance have been preserved continuingly once the conspiracy counts were dismissed?

5. Where the proofs show undisputedly (or beyond serious dispute) that at most the petitioners' role was, allegedly, as sellers of stolen United States Government Bonds for a fixed cash consideration, with no shred of evidence of knowledge of the alleged conspiracy to pass the bonds or of any of the details of the alleged scheme, and with no shred of evidence of participation in or encouragement or incitement of the principals in such alleged scheme, was it not error to submit the case to the jury on the theory of aiding and abetting?

6. Was it error to instruct the jury that the alleged accomplice witness Levine, the sole inculpating witness against petitioners, was, in effect, an accomplice as a matter of law? (Not argued in this petition but preserved in the event of the granting of certiorari).

7. The case being one where the uncorroborated testimony of an alleged accomplice witness was the sole inculpating testimony against petitioners, should the prevailing federal rule dispensing with the requirement of corroboration of an accomplice witness be reconsidered and abandoned? (Not argued in this petition but preserved in the event of the granting of certiorari)

Constitutional Provisions, Statutes and Rules Involved

The case involves the Fourteenth Amendment of the Constitution of the United States (due process of law); 18 U. S. C. §495; 18 U. S. C. §2; 18 U. S. C. §371; and F. R. Cr. P., Rules 8, 12 and 14. These provisions are printed in the Appendix, *infra*.

Statement of the Case

Petitioners were convicted in the District Court, after a jury trial, under eighteen Counts of a five hundred and forty count indictment which charged aiding and abetting the forging and uttering of stolen United States Government Bonds in violation of 18 U. S. C. §495 (and see 18 U. S. C. §2). These eighteen conviction counts, in turn, represented merely a doubling of nine forging counts to which were added the respective nine corresponding uttering counts; in fact, even these nine alleged situations are actually reducible to one group of nine bonds belonging to a single person (the so-called Fankuchen bonds, *infra*). The five hundred and forty count indictment is printed at D9a-63a.[1] The judgments of conviction were not printed for the Court below, but they are printed in the Appendix *infra* at pp. 12a-15a, and they appear in the certified copy

[1] "D a" refers to the "Appendix to Appellants' Briefs" (printed) in the Court below, nine copies of which are filed herewith. References herein to "Tr. " are to the typewritten stenographic minutes of the trial in the record on appeal, the pagination used herein being the original stenographer's pagination (the complete original record on appeal is filed herewith). References to " a" herein, *i.e.*, without any prefixed alphabetical designation, are to the printed "Appendix for United States of America" in the Court below, nine copies of which are filed herewith.

of the transcript of record before the Court below at pp. 1370 and 1373. Each of the petitioners was sentenced to eight years on each count, to run concurrently (*ibid*). The petitioners appealed to the Court of Appeals from the respective judgments of conviction (*id*. pp. 1374-1375, 1382-1383). The judgment of the Court of Appeals here sought to be reviewed affirmed the convictions (Appendix, *infra*, p. 11a). Petitioners are free on bail, and the mandate of the Court of Appeals has been stayed, pending the proceedings in this Court.

The Government's theory, under its five hundred and forty count indictment was that the two petitioners herein were prime members of a ring for the wholesale forging and uttering of United States Government "E" Savings Bonds allegedly stolen from various private individuals, and that the forging of each bond, plus the uttering of each bond, constituted a separate offense justifying these extraordinary multiple counts—there being two conspiracy counts (numbers 539 and 540) along with five-hundred and thirty eight substantive counts. The other members of the alleged ring, who were indicted together with the two petitioners herein, were Campisi, Donatiello, Levine, Parks and Bartkovsky. The joinder of offenses and defendants in the five hundred and forty count indictment may be summarized as follows:

[1.] Forgery counts 1 through 156.
and the corresponding
Uttering counts 157 through 312.
Levine
Sanantonio
Coppolla
Donatiello

[2.] Forgery counts 313 through 318
and the corresponding
Uttering counts 319 through 324.
Parks
Sanantonio
Coppolla
Donatiello

[3.] Forgery counts 325 through 329
and the corresponding
Uttering counts 330 through 334.
Sanantonio
Coppolla
Levine
Parks

[4.] Forgery counts 335 through 369
and the corresponding
Uttering counts 370 through 404.
Bartkovsky
Donatiello

[5.] Forgery counts 405 through 471
and the corresponding
Uttering counts 472 through 538.
Bartkovsky
Campisi

[6.] Count 539 (conspiracy)
Sanantonio
Coppolla
Donatiello
Levine
Parks

[7.] Count 540 (conspiracy)
Donatiello
Bartkovsky
Campisi

The above breakdown of the joinder of offenses and defendants shows that the petitioners were named in the first alleged conspiracy with Donatiello, Levine, and Parks (Count 539), but that Donatiello was the only one of the five who was also named in the second alleged conspiracy. As to the substantive counts, not a single one of the five defendants in the first alleged conspiracy was named in a total of one hundred and thirty-four counts (Counts 405 through 538), and only Donatiello was named in an additional seventy counts (Counts 335 through 404). The petitioners were not named in two hundred and four substantive counts (Counts 335 through 538).

Petitioners moved in the District Court for relief addressed to the joinder aspects of the indictment and its overall extraordinary scope (2a-10a).[2] Such relief was denied on the ground that the requests were untimely and that the objections had therefore been waived under Rule 12, F. R. Cr. P. (*ibid*). However, the District Court reproved the Government, in extremely strong language, for bringing on such an indictment.[3] Subsequently, during the trial, the District Court again excoriated the Government for the size of the indictment, terming it "an abortion", and warning that he was going to inform the Attorney General

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[2] As explained in fn. 1, *supra*, this refers to the Government's printed Appendix in the Court below.

[3] The District Court called the indictment "amazing" (4a), demanded to know "what it is all about", "a 540 Count indictment", "Why are there two conspiracies here" (*ibid.*), "these 540 Counts are ridiculous Counts" (9a), "I have expressed myself in no uncertain terms to the United States Attorney on that" (*ibid.*). Another District Judge, to whose attention the same indictment had come on an earlier date, when told that the indictment contained 540 Counts, exclaimed, "Who perpetrated that monstrosity in this case?" (R. 1408—stenographic transcript of proceedings of November 22, 1961, p. 2).

about this "crazy * * * numbers game of large numbers of counts in indictments, * * * and if this goes on any more they better send somebody up here to take over the United States Attorney's office. It's ridiculous. * * * *" (198a-199a). Similarly, during the course of the trial, the District Court exclaimed, "If the jury can follow it they are better than I am. * * * *" (Tr. 560). On another occasion during the trial the District Court said, "It gets more like Alice in Wonderland every minute" (212a). Notwithstanding all of these scathing criticisms of the indictment, the District Court permitted the trial to proceed on the entire five hundred and forty counts, seemingly in the belief that "It seems to me that if they [the prosecution] want to do it there is nothing I can do about it" (Tr. 855).[4] (As recited *infra*, the District Court did finally induce the Government to cut down the number of counts for submission to the jury, but to a large extent this was necessitated anyhow by failures of proof (especially as to the two petitioners herein); and it did not result in taking away from the jury any of the evidence as to the cases against the two petitioners with respect to any of the thus ultimately omitted counts.)

The trial of this indictment proceeded against only four of the original seven defendants, because Levine, Parks and Bartkovsky pleaded guilty before the trial began; this left the two petitioners, and Campisi and Donatiello. The prosecutor announced in his opening that as against these four defendants "we are going to prove each and every count of this indictment, both the conspiracies and the forging and uttering" (D88a). The Government's theory

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[4] Petitioners of course hope that there is something which this Court can do about it.

was that the petitioners were the suppliers of the stolen bonds under all of the first three hundred and thirty four counts of the indictment, that their alleged supplying of these bonds was to Donatiello primarily and in a few instances directly to Levine, and that Donatiello in turn supplied these bonds to Levine who was to cash them; also, that Levine in turn supplied some of the bonds to Parks to be cashed by the latter. The remaining forgery and uttering Counts (numbers 335 through 538) were theorized by the Government as having involved Donatiello or Campisi as suppliers of the bonds, and Bartkovsky as the passer. The use of two separate conspiracy Counts was justified by the Government on the basis of the aforementioned breakdown as between the two sets of substantive Counts (i. e. those involving and those not involving the petitioners herein as alleged suppliers); and the joining of the two conspiracy counts was justified by the Government on the basis that Donatiello was some kind of link between the two conspiracies.

The principal difficulty for the Government in the actual development of the proof at the trial turned out to be that the petitioners herein, instead of being involved as charged in the supplying of bonds under all of the first 334 counts (or 167 forging counts plus 167 uttering counts), were allegedly linked by the proofs to only 18 of those counts (9 forging plus 9 uttering counts). The Government conceded that its case against petitioners as to all of the other counts had not developed (Tr. 813-814). This meant that the entire host of alleged forgings and utterings committed by other defendants prior to around the end of November, 1960 were not connected up with the petitioners. Indeed, it was undisputedly evident from the Government's proofs that the other defendants, especially Donatiello and

Levine, if guilty, had operated the alleged ring absolutely without any participation of any kind by the petitioners herein for a period of nearly six months in 1960 and, the undisputed indications in fact were that at least Levine (one of the defendants who pleaded guilty) was involved in either this alleged ring or a predecessor one much earlier in 1960 and perhaps in 1959.

The nine forging counts (with their nine corresponding uttering counts) which were the only substantive counts submitted to the jury against the two petitioners herein, related to bonds which the petitioners allegedly supplied to Donatiello and Levine or to Levine alone between late November 1960 and early January 1961 (Counts 153 to 156, inclusive; 309 to 312, inclusive; 325 to 334, inclusive). The sole testimony implicating the petitioners under these counts came from the alleged accomplice witness Levine. Levine's testimony was to the effect that he and Donatiello visited the petitioners a number of times during the second half of 1960 to try to buy bonds from them, that the petitioners at last told Levine and Donatiello that some bonds were expected, that late in November, 1960, some bonds in the name of a Dr. Fankuchen were sold by petitioners to Levine and Donatiello for some money then and there paid (the amount of which Levine did not know), and that on three subsequent occasions in late 1960 or early 1961 additional Fankuchen bonds were sold by petitioners to Donatiello and Levine or to Levine alone, money of an amount unknown to Levine being paid on each of these occasions—on the last occasion Levine paid some money and was to pay the rest in a few days (66a-75a, 79a-83a, 87a-88a, 91a-95a, 97a-103a, 106a-113a; D96a-102a; Tr. 288-316, 324-330, 397).

The above described testimony of Levine, it is to be noted, was the sole proof for the Government in support of its charges of aiding and abetting in this case by the two petitioners herein. It was also the sole proof in support of the charges under the conspiracy Count which named the petitioners (Count 539). In any event, however, the conspiracy counts were not submitted to the jury (Tr. 1002-1003), and the case therefore went to the jury against the petitioners solely on the above mentioned substantive counts (*ibid*).

But, as previously mentioned, the Court let the jury consider all of the evidence which had been introduced by the Government on all of the original 540 counts of the incident (D160a-161a, 165a, 182a-183a; Tr. 182a-183a). The reasons why the District Court took this action were never explicitly stated by the Court in a systematic way, but it would appear that, since the case against all four of the defendants who were on trial was being submitted to the jury, and since this in the Court's view entailed in one way or another leaving in all of the evidence, the jury would have to be allowed to consider all of the evidence, under general precautions from the Court as to segregation of the respective portions of the evidence in relation to each defendant and in relation to the respective counts which remained in the case as to each defendant (e.g., 238a-240a; Tr. 867-868, 1000-1003). Even all of the evidence which had been received solely as being admissible under the dismissed conspiracy counts was left in the case to be considered by the jury (e.g., D160a-161a), apparently because the dismissal of the conspiracy counts was ordered only on the theory that the Court deemed them superfluous in view of the aiding and abetting nature of all of the substantive

counts (238a-240a; Tr. 867-868, 1000-1003). The defense repeatedly objected and took exceptions to the leaving in of all of this evidence (see testimony cited in preceding references in this paragraph).

Thanks to the leaving in of all of this evidence, the jury case against the petitioners was allowed to include a heterogeneous mass of inflammatory, guilt-associative evidence emanating the aura of a conspiratorial "ring"—a "ring" with which the evidence under the relevant remaining counts against the petitioners did not actually link them in any way except in regard to the brief isolated Fankuchen bond transactions of late 1961. This conspiratorial aura included, *inter alia*, voluminous testimony as to sensational burglaries of bonds with which the petitioners were never connected (e.g. 27a, 32a, 38a, 55a-57a, 156a-158a, 162a-163a; Tr. 476-541—see defense objections, e.g., 33a, 45a-57a), the forging and cashing of literally hundreds of bonds with which the petitioners were never connected (and by persons with whom they were never connected) (see testimony of Levine, cited *supra*; Parks, 127a et seq., Barthovsky, 177a et seq.), and lurid details as to the elaborate stratagems used in cashing all of the bonds even though it was undisputed that the petitioners were never involved in such stratagems or in the cashing of any of the bonds and had at most sold nine bonds to Donatiello or Levine on an outright buy and sell basis (Levine, Parks, Bartkovsky, *supra*).

In the Court of Appeals petitioners urged that it had been unjust to try them under this 540 count indictment instead of severing their cases for separate trial; that the crime of aiding and abetting had not been proved in view of the Government's failure to prove anything more than that petitioners had sold bonds outright to Donatiello or

Levine; and that petitioners had been prejudiced by the Trial Court's allowing the jury to consider all of the evidence in the case after virtually all of the counts including the conspiracy counts had been eliminated as against the petitioners. The Court of Appeals declined to reach the argument addressed to the size of the indictment on the ground that the record showed a waiver under Rule 12. It held that the evidence was sufficient to convict the petitioners of aiding and abetting because possession of the bonds by petitioners was unlawful, there was an element of "clandestine selling," and there was "the implicit conditioning of future business of the same nature and at least part payment for past transactions on successful passing"; and that these circumstances "furnished the required 'stake in the success of the venture'" contemplated by *United States v. Falcone*, 109 F.2d 579 (C.C.A. 2), aff'd 311 U. S. 205. (Appendix, *infra*, pp. 6a et seq.) The Court of Appeals also held that "since the conspiracy counts were amply proved and were dismissed only to simplify the issues, the declarations of the co-conspirators were admissible"; and that "it was not error to send to the jury the bonds that were the subject of counts that were later dismissed because no motion to strike them was made" (Appendix *infra*, p. 10a).[5]

Reasons for Granting the Writ

1. In their overall impingement upon the rights of the petitioners herein, the prosecutive devices used in this case and the failure of the Trial Court to stay the Government's hand, present a situation of outstanding im-

[5] Petitioners (defendants) repeatedly objected to the retention of this evidence (*supra*).

portance for this Court's intercession in the interests of the fair and rational administration of federal criminal justice. The first of the District Judges who had occasion to encounter this indictment termed it a "monstrosity"; a like imagery ("an abortion") was suggested by the Trial Judge himself. For a case which, when washed down to its ultimate maximum proportions, ended up involving a brief series of a few bond sales by petitioners allegedly totalling nine bonds in all (and deriving from one single alleged theft), the Government blazoned its way, from the Grand Jury stage onward and down through the Trial Jury's conclusion of its deliberations, with this stupefying aggregation of 538 substantive counts and two conspiracy counts, which latter in turn were so incomprehensibly interwoven with the aiding and abetting aspects of the substantive counts that the Trial Judge himself, not to say the jury, never achieved a rational mastery of the factual issues and the proofs. In addition to the instances in the record previously cited which evinced the Trial Court's dismay (and the prosecution's own confusion) over the labyrinthine posture of the charges and the proofs see, e.g. 205a-213a, 237a-238a; Tr. 667-668, 813-814, 845-847, 1148-1149; D158a, 160a-161a; even after the Trial Judge had dismissed the conspiracy counts he at one point apparently forgot that he had done so and was on the point of admitting additional evidence on the conspiracy theory (Tr. 1148-1149). The dismissal of all but a tiny fraction of the counts as against these petitioners did not relieve the situation, of course, because, as seen, all of the evidence stayed in the case as submitted to the jury.

The Government's reasons for wanting the indictment drawn and the case tried in this way are not difficult to

surmise. Conspiracy, the "prosecutor's darling", was of course to be expected here. But by the intermingling of conspiracy with aiding and abetting, and by the mountainous piling up of hundreds upon hundreds of substantive counts ostensibly cementing together what ultimately turned out to be the quite distinct segments of defendants' alleged criminal activities, the Government in this case forged a prosecutive weapon that could fail of its blunderbuss targets only if the Courts interfered as a matter of law and procedural justice. And, we may further surmise, there was an even deeper reason why the Government wanted it this way with particular regard to the cases of petitioners Coppolla and Santantonio: As it turned out, a serious issue was presented in terms of the law of aiding and abetting (*infra*) as to whether federal jurisdiction existed at all to indict and try these petitioners, or whether their alleged offenses were cognizable solely by the state prosecutive authorities. There is apparently no federal statute which makes it a crime merely to possess or to sell stolen United States Government Bonds absent the interstate commerce jurisdiction—it is undisputed that the few substantive counts submitted to the jury as against the petitioners herein involved purely intrastate features.

Thus, the Government was guilty in this case not only of grossly overreaching methods of prosecution for supposed *federal* crimes, but it contrived an outright arrogation of jurisdiction as to a matter which fell within the purview of the State of New York (if anywhere). Seldom if ever, we venture to say, has a prosecutive scheme combined so many elements of procedural *ultra vires*, lack of jurisdiction of the subject matter, and downright constitutional impropriety.

What of the determination by both of the Courts below that the questions raised concerning the joinder aspects and the scope of the indictment were waived by reason of the assertedly acknowledged untimeliness of the defense motions addressed thereto? First, we earnestly ask this Court to read the pertinent portion of the Trial Minutes (2a-10a), where, we submit, it appears far from unambiguously that the defense acknowledged any such waiver. Second, in any event, if we are correct in our formulation of the points here in question as partaking of the quality of subject-matter jurisdiction and due process constitutionality, the defense motions were not ones that could be waived in the manner asserted by the Courts below but were in the nature of motions addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12.

We acknowledge that we have found no case dealing with the precise combination of issues presented by the form of the present indictment and the trial consequences thereof in this case. However, we think that on the score of the prodigiously multiple counts alone, this Court's decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218 points to the unacceptability, in principle, of indictments of this portentously over-aweing type which cannot be effectively handled by a jury or fairly defended against by accused persons. In the very few cases we have found where objections against such indictments have been made on due process grounds, the denial of such constitutional objections occurred with respect to indictments which contained not remotely so many counts as this one, and without the presence of the other aggrieving

factors which exist in this case. E.g., *People* v. *Allen*, 352 Ill. 262, 185 N. E. 685 (1933) (16 Counts).

2. Even apart from the points above mentioned as to the due process and subject-matter jurisdiction aspects of the situation, the case is appropriate for certiorari on the issue of misjoinder and rights of severance in view of the dismissal of the conspiracy counts. Cf. *Schaffer* v. *United States*, 362 U. S. 511, 516. True, the Trial Court herein apparently dismissed the conspiracy counts primarily for purposes of simplification (deeming them unnecessarily duplicative of the aiding-and-abetting charges in the substantive counts), rather than on an express basis of failure of proof; this was emphasized by the Court of Appeals (Appendix, *infra*, p. 9a). However, we think it would be demonstrable in the more ample space allowed in a brief on the merits that the correct ruling of the Trial Court on the conspiracy count affecting the petitioners (Count 539) would have been to dismiss them for failure of proof. Indeed, if this Court should find indicatively meritorious our discussion *infra* of the legal sufficiency of the proofs on aiding and abetting, we believe the conclusion would follow that the Government's conspiracy proofs in this case failed with respect to these petitioners. There is not one word in the record to support the inference that the petitioners knew of a *conspiracy* among Donatiello, Levine and Parks to conduct the alleged scheme of the latter three individuals for the forging and uttering of the bonds, much less that the petitioners knew of any of the alleged details of that alleged scheme or of how it had been carried out in the past or might be carried out in the future. *A fortiori*, as we show *infra*, the petitioners did not *join* any such alleged conspiracy or participate therein or aid it in any way as

conspirators; on this too there is no proof whatsoever in the record. Therefore, under the rule of the *Schaffer* case, *supra*, the Trial Judge had "a continuing duty * * * to grant a severance if prejudice does appear". Against the background in recent decades of the distressing deterioration of standards of fair trial and fair proof in federal prosecutions where the Government resorts to the conspiracy dragnet, the presentation upon the instant record of the aforementioned issue which this Court so recently revitalized in the *Schaffer* case, and in view also of the total circumstances of the Government's overreaching prosecutive procedures in this case, we submit that the *Schaffer* issue alone, without more, merits the granting of the writ in this case for the sake of preserving the fair administration of federal criminal justice.

3. *United States* v. *Falcone*, 311 U. S. 205, and *Direct Sales Co.* v. *United States*, 319 U. S. 703, are the well known statements by this Court of the tests of federal criminality of sales to an illegal enterprise under a prosecution for conspiracy or aiding and abetting. *Falcone*, which involved sales of sugar to illegal distillers, insists upon the seller's knowledge of the conspiracy in which the buyer was allegedly engaged. *Direct Sales Co.*, which involved narcotics, laid stress upon the nature of the article sold, but it preserved the *Falcone* requirement of knowledge of the conspiracy and it conceded also that not every instance of sale of harmful or illicit goods will support a charge of conspiracy, stating specifically that "There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active

incitement to purchase" (319 U. S. at p. 712, fn. 8). As appears from the cases mentioned *infra*, the conspiracy doctrines of *Falcone* and *Direct Sales Co.* have permeated (albeit quite non-uniformly) the subsequent stream of case law in the lower federal courts in regard to aiding and abetting, even though it would seem that situations of the latter class call for an even more restrictive rule in favor of defendants since the crime of aiding and abetting requires that the principal offense be actually effected whereas conspiracy, of course, is complete upon the mere making of the conspiratorial agreement subject only to the overt act requirement. (The subsequent judicial history of *Falcone* and *Direct Sales Co.* is resumed *infra*.)

We think we may say it is undisputed, or at least not seriously disputed, that the sole relevant testimony of alleged aiding and abetting in this case regarding the petitioners herein goes no farther than the following (*per* the accomplice witness Levine): The defendants Levine and Donatiello visited one or both of the petitioners an unspecified number of times during the second half of 1960, it being Levine's impression that the purpose of these visits was for Levine and Donatiello to try to purchase stolen United States Government Bonds from one or both of the petitioners. Late in November, 1960, one or both of the petitioners for the first time said some bonds would be available shortly. Later in November, 1960, and three subsequent times thereafter up to early January, 1961, one or both of the petitioners sold to Donatiello and Levine, or to Levine alone, bonds which were in the name of Faukuchen. These sales were paid for in money on each of the four occasions mentioned, except that on the last occasion, involving Levine and petitioner Coppolla alone, Levine did not have the entire amount of the purchase price and was

to bring it within a few days. On one occasion Donatiello complained to Levine that "Freddie" (apparently referring to Sanantonio) would not sell them bonds when they did not have the cash to pay for them. There is not one shred of testimony that the petitioners or either of them knew of the Donatiello-Levine-Parks scheme for disposing of the bonds or that they knew any of the details thereof; or that they participated in such schemes; or that they assisted it in any manner whatsoever except insofar as their alleged supplying of the bonds to Donatiello or Levine might be deemed to have the effect of such participation or assistance.

These undisputed (or not seriously disputed) facts establish, we submit, that the only conceivable crime with which the petitioners herein were chargeable would have been the crime of possession or sale of stolen securities under the law of the State of New York—as we suggested *supra*. We submit that there is nothing in this factual picture that could possibly form the basis for submission to a federal jury of the charge of aiding and abetting a violation of 18 U. S. C. § 495—or a charge of violating any other federal statute. There is not present in this scene either the knowledge of conspiracy required by the *Falcone* case, *supra* (indeed there is not even present in this case any longer the charge of conspiracy), nor is the test of *Direct Sales Co.* met as to "a. * * * continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase".

However, the inquiry as to the appropriateness of certiorari in these circumstances is not terminated by a consideration of *Falcone* and *Direct Sales Co.* alone. The pre-

viously referred to subsequent judicial history of those decisions strongly enhances the appropriateness of certiorari, because those two decisions, which stand as this Court's most recent guidance on the subject to the lower federal courts, have been the subject of a notably disparate and confused (and numerous) series of interpretations in the various Circuits. As was said by Circuit Judge Sibley, for the Court, in *Johns* v. *United States*, 195 F. 2d 77, 79 (C. A. 5 1952), referring to this precise question, "It would be tedious and unprofitable to review the cases and attempt to distinguish or reconcile them". An idea of the extent of the judicial ferment among the Circuits on this subject to which Judge Sibley was referring may be gained from the *Note* in 53 Col. L. Rev. 228 (1953), entitled *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*. Cases illustrating the ferment since this 1953 *Note* was published are: *Riggs* v. *United States*, 280 F. 2d 750 (C. A. 5 1960) (recognizing that even in the sale of counterfeit currency more than a mere sale or transfer is seemingly required); *United States* v. *Carlucci*, 288 F. 2d 691 (C. A. 3 1961) (involving firearms stolen from the Federal Government and resting the decision on the presence in the record of specific evidence of active participation by the seller in the buyers' criminal enterprise); *Jones* v. *United States*, 251 F. 2d 288 (C. A. 10 1958), cert. den. 78 S. Ct. 703 (reversing a conspiracy conviction as against a Missouri liquor dealer who sold large quantities of liquor to other defendants who he knew were involved in sales in Oklahoma, a dry State, the conspiracy charged being one to violate federal law by importing liquor into Oklahoma); *Quirk* v. *United States*, 250 F. 2d 909 (C. A. 1 1957), cert. den. 78 S. Ct. 669 (noting the existence of circumstances of actual participation by pre-arrangement in the substantive

crime charged); *Ritter* v. *United States*, 230 F. 2d 324 (C. A. 10 1956) (similar to case last cited); *Bartoli* v. *United States*, 192 F. 2d 130 (C. A. 4 1951) (a counterfeit money case resting decision partly upon evidence of direct participation in the ultimate illicit scheme); *Johns* v. *United States*, 195 F. 2d 77 (C. A. 5 1952) (applying Judge Learned Hand's decision in the *Falcone* case, 109 F. 2d 579, as to the rule concerning the accused's "stake in the venture"). For significant examples of the earlier cases where no conspiracy or aiding or abetting was found, see the previously cited Note in 53 Col. L. Rev. 228, at p. 236, fn. 44. The decision here sought to be reviewed is difficult to reconcile with the foregoing.

The Court below, we submit, has taken a simplistic view both of the law and the facts in concluding that the charge of aiding and abetting was proved on the instant record. It nowhere implements its factual assertion that the petitioners committed any acts looking to an "implicit conditioning of future business of the same nature and at least part payment for past transactions on successful passing" (Appendix *infra*, p. 6a). Its Draconic application of *Falcone* and *Direct Sales Co.* adds nothing to the federal jurisprudence of this subject except further uncertainty and disparity of doctrine among the Circuits.

This branch of Federal criminal prosecution is of sufficient importance, we submit, in view of its potential oppressiveness as so strikingly illustrated in this case, to justify this Court in taking the matter up on certiorari for the purpose of laying down new guidelines for the Circuits in face of the disorganized results among the Circuits since the decisions in *Falcone* and *Direct Sales Co.* were handed down some twenty years ago.

Conclusion

For all of the foregoing reasons a writ of certiorari should issue in this case. The decision below should not be permitted to stand as a guide for future federal criminal trials.

Respectfully submitted,

Jerome Lewis
Attorney for petitioners
66 Court Street
Brooklyn, New York

APPENDIX A

Opinion—United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 371—September Term, 1961.

(Argued June 13, 1962 Decided July 23, 1962.)

Docket No. 27447

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CAMPISI, EDWARD CARMINE COPPOLLA, ANTHONY J. DONATIELLO and ALFRED SANATONIO,

Appellants.

Before:

FRIENDLY, KAUFMAN and HAYS,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge*, entered upon the verdict of a jury, convicting appellants of violations of 18 U. S. C. §§495, 2. Affirmed.

SHELDON H. ELSEN, Assistant United States Attorney, New York, New York (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Arnold N. Enker, Thomas F. Shea, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee.*

SAMUEL D. BOZZA, Newark, New Jersey, *for Appellant Campisi.*

DAVID MARKOWITZ, New York, New York, *for Appellant Coppolla.*

MICHAEL A. QUERQUES, Orange, New Jersey, *for Appellant Donatiello.*

MICHAEL P. DIRENZO, New York, New York, *for Appellant Sanantonio.*

HAYS, *Circuit Judge*:

Appellants appeal from their convictions of aiding and abetting the crime of forging and uttering stolen United States Government bonds in violation of 18 U. S. C. §495. See 18 U. S. C. §2. We affirm all the convictions.

In addition to the appellants, Herbert Levine, Meyer Parks and Thomas Bartkovsky, were indicted as co-defendants. They pleaded guilty and testified for the government.

On the basis of the evidence introduced by the government, the jury could find the following facts: The bonds that were the subject of the indictment were stolen from the homes and offices of a series of private persons. They were cashed between May, 1960 and January, 1961, mainly in banks located in small towns, by persons who posed as the registered owners. Sanantonio and Coppolla sold stolen bonds to Donatiello, Campisi and, for a short period, Levine, for an agreed percentage of the face value of the bonds. Although payment to them for the bonds was not expressly conditioned on the successful negotiation of the bonds,

some, at least, of the bonds were sold on credit. (The credit aspect of the transaction suggests that if the bonds could not be resold Sanantonio and Coppolla would not be paid.) Campisi, Donatiello and Levine relied on passers to resell the bonds and worked closely with the passers, Parks, Bartkovsky and, at one time Levine, to achieve this end. Donatiello and Campisi would supply the passers with bonds and with blank drivers' licenses on which validating stamps had been forged. Each passer inserted his own physical characteristics and signed the name of the registered owner of the bond. The passers and the middleman would drive to a town in which they were not known and select a local address and enter it on the license. The passer would then go to a local bank, forge the endorsements and present the stolen bonds for payment, using the driver's license as identification. Immediately after leaving the bank the passer would turn the proceeds over to the middleman and receive an agreed upon percentage.

None of the appellants challenges the sufficiency of the evidence to establish these facts and his own role in the general scheme. Levine and Parks testified that they passed stolen bonds for appellant Donatiello and described in detail the circumstances of the transactions. Bartkovsky gave similar testimony with respect to Campisi. Levine testified that Sanantonio delivered a large amount of bonds to him or Donatiello in the presence of Coppolla and that the price was fixed in conversation between Sanatonio and Coppolla on the one hand and Levine and Donatiello on the other. Levine testified that, at a later date, Coppolla and Sanantonio delivered $20,000 worth of stolen bonds to him and

Donatiello for which they received immediate payment. Subsequently, Coppolla sold Levine additional bonds, in one instance after Levine made the initial contact through Sanantonio.

The first question presented by appellants Coppolla and Sanantonio is whether the evidence sufficiently connects them with the substantive crime to support a charge of aiding and abetting. 18 U. S. C. §2. They argue that they merely sold the stolen bonds to Campisi, Donatiello and Levine for an established price and were not concerned with the success or failure of subsequent attempts to pass the bonds unlawfully. In support of the proposition that this conduct does not amount to a sufficient "stake in the venture" to support the charge, they cite *United States* v. *Falcone*, 109 F. 2d 579 (2d Cir.), aff'd, 311 U. S. 205 (1940) and *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938). We do not find these cases applicable.

In *United States* v. *Falcone*, *supra*, the defendant, in the normal course of his business, sold quantities of sugar to certain persons knowing that it would be used in the illegal production of liquor. He was indicted for aiding and abetting the operation of illicit stills. In this court, Judge Learned Hand framed the question as follows: "whether the seller of goods, in themselves innocent, becomes * * * an abettor of the buyer because he knows the buyer means to use the goods to commit a crime." 109 F. 2d at 581. The court answered this question in the negative, holding that "[i]t is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its

outcome." *Id.* The Supreme Court affirmed. The difference between *Falcone* and the case at bar is manifest, since stolen bonds are assuredly not "goods in themselves innocent * * *" and appellants are not prosecuted for failure to "forego a normally lawful activity." The court in *Falcone* evidently thought it undesirable to charge a merchant with the unlawful use a customer may make of his product, although he may know of the unlawful use, when he is selling the goods he normally sells at the price he normally charges and he is not involved in the subsequent wrongdoing. See *United States* v. *Piampiano*, 271 F. 2d 273 (2d Cir. 1959). *Falcone* has been limited

> "to its strict facts—the case of a supplier of goods, innocent in themselves, who does nothing but sell those goods to a purchaser who, to the supplier's knowledge, intends to and does use them in the furtherance of an illegal conspiracy." (*United States* v. *Tramaglino*, 197 F. 2d 928, 930 (2d Cir.), cert. denied, 344 U. S. 864 (1952).)

It is clearly inapplicable to the case at bar.

In *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938), the defendant was charged with aiding and abetting the possession of a remote vendee of counterfeit money. In reversing the conviction the court relied on the fact that the principal, i.e. the individual whose possession defendant was charged with abetting, was not a vendee of the defendant. The court expressly left open the question whether the same result would obtain if the immediate vendee was charged with possession, a question closely analogous to that presented in this appeal.

Much closer to the facts presented by the case at bar than either *Falcone* or *Peoni* is *Direct Sales Co.* v. *United States*, 319 U. S. 703 (1943). There, defendant, a wholesale drug company, sold large amounts of narcotic drugs to a physician with knowledge that he in turn was distributing a substantial portion of them illegally. The Supreme Court sustained a conviction of conspiracy with the physician to dispense drugs in violation of the Harrison Narcotic Act, 26 U. S. C. §§2553, 2554 (1946)* against an attack based on *Falcone*. The court distinguished *Falcone* primarily on the basis of the nature of the articles sold in the respective cases.

> "The difference is like that between toy pistols or hunting-rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade." *Direct Sales Co.* v. *United States, supra*, at 710.

The facts of the case at bar are even more strongly against appellants than those in *Direct Sales*, because here the initial possession by appellants was unlawful and the sales could not be legitimate regardless of the volume of the purchaser. The "element of personal law-breaking and clandestine selling," as well as the implicit conditioning of

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* Now 26 U. S. C. §§4704, 4705 (1958).

future business of the same nature and at least part payment for past transactions on successful passing, "furnished the required 'stake in the success of the venture' that the *Falcone* case demanded." *United States* v. *Tramaglino*, *supra*, at 931. *United States* v. *Piampiano*, 271 F. 2d 273 (2d Cir. 1959) holds that *any* deviation from the strict facts of *Falcone*, even a lawful departure from the normal course of business or cooperation in concealing delivery, is sufficient to connect the vendor with the criminality of the vendee. Cf. *United States* v. *Russo*, 284 F. 2d 539, 541, n. 3 (2d Cir. 1960). Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Colum. L. Rev. 228 (1953).

We conclude that the evidence amply supports the charges of aiding and abetting against Coppolla and Sanantonio. The trial court's charge on the elements that constitute the crime of aiding and abetting was wholly in conformity with prevailing law.

Appellants Campisi, Coppolla and Sanantonio raise certain questions about the alleged undue length of the indictment, prejudicial joinder and the denial by the trial court of motions to sever. We do not reach the merits of these contentions because we hold that the objections were waived in the court below.

Rule 12 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) The Motion Raising Defenses and Objections.
>
> * * * * * *
>
> (2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction

> in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.
>
> * * * * * *
>
> (3) *Time of Making Motion.*
>
> The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Here the pleas were entered in November, 1961 and pursuant to Rule 12(b) (3) the district judge postponed the date on which motions under Rule 12(b) (2) were to be made until December 4, 1961. At that time no motions directed to the length of the indictment, joinder or severance were made. Under the express provision of 12(b) (2) the "[f]ailure to present [the] objection * * * constitutes a waiver thereof, * * * "

The appellants moved for severance on the morning the trial was scheduled to begin. No attempt to show cause justifying relief from the waiver was made except to point to the press of other engagements and the failure of predecessor counsel to make a timely motion. There was no claim that anything new bearing on the proper disposition of the question had been learned after the scheduled motion date. Indeed, in introducing the motion, which was later joined by counsel for Campisi and Coppolla, counsel for Sanantonio stated that the court would be fully justified in denying it as untimely. The record shows that the court

did exactly that. Therefore the objections are not properly before this court as they might have been if the lower court had granted relief from the waiver and denied the motion on the merits.

In order to prove the offense charged the government was required to establish that the bonds which were forged had been stolen, although it was not necessary to connect the defendants directly with the thefts. The appellants were willing to concede that the bonds were stolen, presumably in order to keep from the jury evidence of violent thefts which they thought might prejudice the jury against them on other issues. The government expressed its willingness to enter into a stipulation of this general nature, but the parties were not able to agree on the exact language. Campisi contends that the government was obligated to enter the stipulation and that it arbitrarily refused to do so with the result that much prejudicial evidence was needlessly paraded before the jury. A reading of the relevant portions of the transcript leaves much doubt that it was the government that refused to stipulate, but in any event the government had the right to present evidence that the bonds were stolen in the way it wished to present such evidence, not as appellants would have chosen to do so.

Appellants' remaining contentions are equally without merit. Since the conspiracy counts were amply proved and were dismissed only to simplify the issues, the declarations of the co-conspirators were admissible. *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2d Cir. 1945). The government was within its rights in objecting to the false statement in the summation of counsel for Campisi that his client "has never been convicted of a crime in his life."

Cf. *United States* v. *Universita*, 298 F. 2d 365 (2d Cir.), cert. denied, 82 S. Ct. 1598 (1962). The court correctly charged on the treatment to be accorded the testimony of an accomplice and it was not error to refuse to repeat the point in the language suggested by the defense. It was not error to send to the jury the bonds that were the subject of counts that were later dismissed because no motion to strike them was made and because, as proof that Campisi had committed similar acts, they remained admissible to show his knowledge, motive and intent. *United States* v. *Bollenbach*, 147 F. 2d 199, 200 (2d Cir. 1944), rev'd on other grounds, 326 U. S. 607 (1946).

Affirmed.

APPENDIX B

Judgment—United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and sixty-two.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS BARTKOVSKY, et al.,
Defendants,

ANTHONY CAMPISI, EDWARD CARMINE COPPOLLA; ANTHONY J. DONATIELLO, ALFRED SANANTONIO,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Judgment—United States v. Coppolla

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr 978

UNITED STATES OF AMERICA

v.

EDWARD CARMINE COPPOLLA

On this 5th day of February, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of unlawfully, wilfully & knowingly falsely making, altering, forging and counterfeiting the endorsements of the registered owners & payees of U. S. Savings Bonds & uttering & publishing the same, knowing the same to be false, forged, altered & counterfeited.

(Title 18, Secs. 459 & 2, U. S. Code).

as charged in cts. 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, incl., & cts. 330 to 334, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Appendix C—Judgment—United States v. Coppolla

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) Years on each of counts 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, inclusive and counts 330 to 334, inclusive, to run concurrently with each other.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Archie O. Dawson
United States District Judge.

Herbert A. Charlson
Clerk.

Appendix C

Judgment—United States v. Sanantonio

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr 978

UNITED STATES OF AMERICA

v.

ALFRED SANANTONIO

On this 5th day of February, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of unlawfully, wilfully & knowingly falsely making, altering, forging and counterfeiting the endorsements of the registered owners & payees of U. S. Savings Bonds & uttering & publishing the same, knowing the same to be false, forged, altered & counterfeited.

(Title 18, Secs. 495 & 2, U. S. Code);

as charged in cts. 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, incl., & cts. 330 to 334, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Appendix C—Judgment—United States v. Sanantonio

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS on each of counts 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, inclusive and counts 330 to 334, inclusive, to run concurrently with each other.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ARCHIE O. DAWSON
United States District Judge.

HERBERT A. CHARLSON
Clerk.

APPENDIX D

STATUTES AND RULES INVOLVED

TITLE 18, U. S. CODE

§ 495. *Contracts, deeds, and powers of attorney*

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

TITLE 18, U. S. CODE

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 18, U. S. CODE

371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8.

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions

connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 12.

Pleadings and Motions Before Trial; Defenses and Objections

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institu-

tion of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) Effect of Determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be con-

tinued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

Rule 14.

Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.